U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: September 9, 1998
Case No. **98 INA 102**

In the Matter of:

TENANT SERVICES, INC.,
Employer,

on behalf of

JUAN M. ALCARAZ,
Alien.

Appearance: W. N. Siebert, Esq., of Los Angeles, California, for Employer and Alien.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JUAN M. ALCARAZ ("Alien") by TENANT SERVICES, INC., ("Employer") under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor ("DOL") at San Francisco, California, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the State Employment Security Service ("SESA") and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On January 13, 1995, the Employer applied for alien labor certification on behalf of the Alien for the position of "Manager, Property,(Bilingual Spanish)" in its Property (Apt. Bldg) Management business. Employer described the Job to Be Performed as follows:

> Manages residential properties; discusses with client terms and conditions for providing management services, and drafts agreement stipulating extent and scope of management responsibilities, services to be performed, and costs for services; collects specified rents and deposits; show and rent vacancies; do light/heavy maintenance for the property; prepare periodic inventory of building contents and forward listing to owner for review; assist with eviction of tenants in compliance with court order. Job site high-crime area; able to keep peace with the gangs and hooalums.

AF 38 (Quoted verbatim without correction or change.)[2] Under Other Special Requirements the Employer said, "Must be able to read, writ, and speak Spanish, 100% of tenancts are Spanish speaking only." *Id.* Although the SESA referred twelve U. S. workers for the position, the Employer did not hire any of the job applicants. AF 32.

Notice of Findings. On January 22, 1997, the CO issued a Notice of Findings ("NOF") advising that certification would be denied, subject to Employer's Rebuttal. AF 42-45. (1) As the occupation does not normally require a foreign language, the CO found that the Employer's specification of fluency in the Spanish language was a restrictive requirement under 20 CFR §§ 656.21(b)(2)(i)(C). The Employer was directed to delete the language Special Requirement from the application or to prove either that the foreign language skill was a customary requirement for the occupation in the United States or that this hiring criterion was a business necessity. AF 25. (2) The CO cited 20 CFR § 656.24(b)(2)(ii) in observing that the CO is

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[2]The wage offered was $14.18, per hour for a forty hour week from 9:00 AM to 9:00 PM, with no overtime. Although no formal education or training was specified, the Employer required two years in the Job Offered. The Alien's qualifications made no reference to his education, but stated that he was working on the job for the Employer from September 1992 to the date of application. In addition, he worked as a Property Manager in the business of Apartment Building Property Management in Mexico from February 1985 to March 1988. From May 1988 to September 1992 the Alien was "self-employed" in cleaning and maintenance as a property manager in Los Angeles. AF 103.

required to consider a U. "S. worker able and qualified for the job if the worker by education, training, experience or a combination thereof is able to perform in the normally accepted manner the duties involved in the occupation as it customarily is performed by other U. S. workers similarly employed. The CO said that although U. S. workers Alvarez and Figueroa both appeared qualified for the job, based on their resumes, the Employer failed to provide lawful and job related reasons for rejecting these applicants and questioned their qualifications and availability. The CO then described the evidence required to rebut these findings.

Rebuttal. On February 14, 1997, the Employer filed its rebuttal addressing the issues discussed in the NOF. AF 11-23. The rebuttal included statements by Counsel (AF 11-13), and a list of tenants apparently occupying the premises on May 1995 (AF 14), letters to the two rejected applicants by the Employer, and copies of resume materials for each of them (AF 15-19).

Final Determination. The CO denied certification by the Final Determination issued April 1, 1997. AF 05-10. Noting that Employer's counsel had stated the reasons the foreign language requirement was essential to the performance of the job duties, the CO said that this did not prove business necessity. The CO explained,

> Mere assertions by the employer's counsel does not substantiate that the foreign language is a business necessity. The employer has not proven that his Spanish surname tenants do not understand the English language. Furthermore, it is also well established that the assertions in rebuttal by the employer's counsel does not constitute evidence cognizable by the board.

AF 07.

Appeal. Employer requested reconsideration and administrative-judicial review on April 22, 1997. AF 01. The Employer's brief said the reason for the request for review was that the CO's decision was against the manifest weight of the evidence, and it argued that its evidence was the complete tenant list, which represented that one hundred percent of the tenant surnames were Spanish. The brief argued that the CO erroneously found that all of Employer's statement were by Counsel when, in fact, on April 20, 1995, Counsel sent a letter that was signed by the Employer, himself. Counsel said that all of his assertions were based entirely on statements of the Employer to him and that for this reason,

> [I]t was not the employer's counsel that made the representation. It was in fact the employer. ... I did not represent anything. I merely reiterated what had been presented to my office by the employer, the essence of which was that the building was located in East L. A., and all of the tenants were Hispanic, speaking primarily Spanish.

Employer's brief, dated December 17, 1997.[3]

Discussion

This appeal presents two issues: (1) whether the Employer has sustained the burden of proving the business necessity of its foreign language hiring criterion and (2) whether the facts asserted in counsel's communications was a credible statement of evidence in his client's behalf.

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, the employer must comply with the Act and regulations when its applies such hiring criteria to U. S. job seekers in the course of testing the labor market in applying for alien labor certification. This is particularly the case where, as in this application, Employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), a regulation adopted to implement the relief granted by the Act, which provides that the job offer shall not include the capacity to communicate in a language other than English as a hiring criterion unless that requirement is adequately documented as arising from business necessity. The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the foreign language requirement bears a reasonable relationship to the occupation in the context of its business and (2) the use of that foreign language is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first prong of this test, it is helpful to show the volume of the employer's business that involves foreign language speaking customers or its business usage of that language. This is demonstrated with proof as to the customers, co-workers, or contractors who speak the foreign language and the percentage of the employer's business that involves that language. Both prongs of this test must be met. Simply proving that a significant percentage of the employer's customers speaks the foreign language is not sufficient to establish business necessity under this subsection, unless the employer also proves the existence of a relationship between the customers' use of that foreign language and the job to be performed.[4]

This issue must be determined on the evidence of record, however. This Board has in the past held *en banc* that a factual theory presented by counsel in a brief cannot serve as evidence

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[3] The matter was before the state employment security agency on April 20, 1995. During August 8-10, 1995, the job was advertised under the supervision of the state employment security agency to which the Employer reported the result a few weeks later. The letter dated April 20, 1995, was filed part of Employer's rebuttal. The signature of Hilton Eidelman, the President of the Employer at the bottom of the page was not preceded by any text. AF 13, 35.

[4] In **Coker's Pedigree Seed Co.**, 88 INA 048 (Apr. 19, 1989)(*en banc*), and in **Hidalgo Truck Parts, Inc.**, *supra*, business necessity was established by evidence of significant customer dependence on Spanish-speaking employees. In **Splashware Company**, 90 INA 038 (Nov. 26, 1990), however, the employer did show that a significant percentage of its clientele spoke the foreign language exclusively, but the Board found that business necessity was not proven because there was no relationship between the customers' use of the foreign language and the job to be performed.

of material facts. **Yaron Development Co., Inc.**, 89 INA 178 (Apr. 19, 1991)(*en banc*).[5] In this case, all of Employer's representations were made by its attorney with the possible exception of the letter of April 20, 1995. Assertions by employer's attorney that are not supported by underlying statements by a person with knowledge of the facts do not constitute evidence. **Moda Linea, Inc.**, 90 INA 424 (Dec. 11, 1991).[6] On examining AF 13, the item of evidence on which Counsel's argument relies, the Panel did not see an "underlying statement by a person with knowledge of the facts." We simply saw a letter that--- at the most---the client countersigned for the attorney, and nothing more. Even if Employer's signature were accepted in this context, however, the facts he asserted were capable of support by independent documentation. The Employer's countersignature is claimed for the following statement by counsel:

> Please see attached list of tenants and 90% the worker will be using the language on the job.

AF 13. The attached list of tenants set out surnames that appeared to be Hispanic. This list does not speak for itself, however. Regardless of their national derivation, we cannot assume that all or any proportion of the persons with Hispanic surnames who then occupied those apartments spoke Spanish to the exclusion of English. Moreover, the above quoted language communicated nothing about the Property Manager's use of the Spanish language to perform this job.

In short, even if the letter in AF 13 was given weight despite the Employer's omission of any indication that he had knowledge of the facts asserted, he said nothing that was supported by persuasive evidence that independently proved any part of the facts necessary to establish the Employer's business necessity for the foreign language skills mandated by the Job Requirements. For this reason we conclude that the evidence supported the CO's denial of alien labor certification on grounds that the Employer failed to sustain its burden of proof.

Accordingly, the following order will enter.

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[5]To the same effect see also **Mr. and Mrs. Elias Ruiz**, 90 INA 425(Dec. 9, 1991); **D & J Finishing Co., Inc.**, 90 INA 446 (Nov. 4, 1991); **Personnel Services, Inc.**, 90 INA 043 (Dec. 12, 1990); **DeSoto, Inc.**, 89 INA 165 (Jun. 8, 1990); **Dr Sayedur Rahman**, 88 INA 112 (Mar. 20, 1990). The Board held in **Fernando Jewelry Co.**, 91 INA 006 (Apr. 30, 1991), that the statements of counsel or of a lay representative must be considered by the CO to the extent that they constitute argument, citing 20 CFR § 656.25(e)(1).

[6]An attorney may be competent to testify about matters of which he has first-hand knowledge, however. **Modular Container Systems, Inc.**, 89 INA 228 (Jul. 16, 1991)(*en banc*).

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.